Amdo Development Co., Inc., and Doris B. Clement v. Woolpert Consultants, 082494 OHCA1, C-930425

AMDO DEVELOPMENT CO., INC., and DORIS B. CLEMENT, Plaintiffs-Appellants,

v.

WOOLPERT CONSULTANTS, Defendant,
and
THE PROVIDENT BANK, Defendant-Appellee.

No. C-930425

94-LW-1707 (1st)

Court of Appeals of Ohio, First District, Hamilton

August 24, 1994

TRIAL NO. A-9006072

Civil Appeal From Hamilton County Court of Common Pleas

DECISION

C.D. Mullenix, Esq., No. 0002297, 1080 Nimitzview Drive, Suite 302, Cincinnati, Ohio 45230, for Plaintiffs-Appellants,

Thomas D. Richards, Esq., No. 0012039, 3322 Erie Avenue, Suite 101, Cincinnati, Ohio 45208, for Defendant-Appellee Provident Bank.

PER CURIAM.

This cause came on to be heard upon the appeal, the transcript of the docket, journal entries and original papers from the Hamilton County Court of Common Pleas, the transcript of the proceedings, the briefs and the arguments of counsel.

The plaintiffs-appellants, Doris Clement and AMDO Development Co., a corporation wholly owned by Clement, appeal from the order of the trial court granting summary judgment to the defendant-appellee, the Provident Bank, on its counterclaim; denying their motion for judgment based upon Civ.R. 54(C); and awarding to the Provident Bank damages and attorney fees. For the reasons that follow, we reverse.

This is the second time this case has been before us on appeal. In the previous appeal, *AMDO Development*

Company, Inc. v. Woolpert Consultants (Jan. 29, 1993), Hamilton App. No. C-910951, unreported, we upheld the trial court's grant of summary judgment against the plaintiffs-appellants on their claim, and dismissed the appeal of the trial court's grant of summary judgment to Provident on its counterclaim since that judgment was only with respect to liability, not damages, and therefore lacked finality under R.C. 2505.02.

On remand, the trial court conducted an evidentiary hearing to determine damages, after which the plaintiffs-appellants moved for judgment in reliance upon Civ.R. 54(C). The motion was denied, and the trial court awarded Provident damages in the amount of $44,463. The trial court also awarded additional attorney fees in the amount of $18,117.60.

I.

In the previous appeal we outlined some of the pertinent facts as follows:

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Vkruwo|#wkhuhdiwhu/#rq#Dxjxvw#6/#4<;</#Fdpsehoo#hqwhuhg#lqwr#d#vhsdudwh#djuhhphqw#zlwk#Fohphqw/#lq#zklfk#vkh#zrxog#sd|#klp#'45/333#zkhq#vkh#sxufkdvhg#wkrvh#vdph#orwv1#+W1g1#56/#H{k1#E1,#Fdpsehoo#glg#qrw/#krzhyhu/#phqwlrq#wkh#Surylghqw0Fdpsehoo#rswlrq#wr#Fohphqw#ehfdxvh/#dv#kh#whvwlilhg/#kh#zdqwhg#wr#frqfhdo#wkh#453#shufhqw#suhplxp#vkh#zdv#sd|lqj#iru#wkh#orwv1#+W1g1#55/#dw#4<1,#Rq#Dxjxvw#;/#4<;</#Fohphqw#sxufkdvhg#wkh#orwv#iru#'43/333#iurp#Surylghqw#dw#zklfk#wlph#vkh#dovr#sdlg#Fdpsehoo#'45/333#iru#d#wrwdo#sxufkdvh#sulfh#ri#'55/3331#+W1g1#55/#dw#4904;1,#Dw#wkh#forvlqj/#Fohphqw#uhfhlyhg#wkh#ghhg#wr#wkh#orwv#iurp#Surylghqw1#-#-#-

Amdo, supra at 3.

In its counterclaim, Provident asserted that the plaintiffs-appellants as assignees of Robert Campbell were obligated, under the terms of the contract to purchase between Campbell and Provident, for the completion of Cranfield Drive and its dedication as a public right-of-way. In support of its motion for summary judgment, Provident submitted the affidavits of Robert A. Campbell, Todd Lazelle, and Harry G. Allen.

In his affidavit dated August 2, 1991, Robert Campbell stated that he signed a contract to purchase with Provident Bank which he "transferred" to Clement and that he provided Clement with a copy of the contract to purchase. [1] A copy of the contract to purchase between Campbell and Provident was attached to Campbell's affidavit. It reads in pertinent part:

Sxufkdvhuv#djuhh#wkdw#wkh|#duh#sxufkdvlqj#wkhvh#vxegl0ylvlrq#orwv#%dv#lv%#dqg#duh#dvvxplqj#wkh#reoljdwlrq#wr#frpsohwh#wkh#vwuhhw#lpsuryhphqwv#dv#uhtxluhg#e|#Frohudlq#Wzs1#dqg#Kdplowrq#Fr1#wr#ghglfdwh#wkh#xqilqlvkhg#sruwlrq#ri#Fudqilhog#Gulyh#dqg#wr#vhfxuh#wkh#Shuirupdqfh#Erqg#dqg#Pdlqwhqdqfh#Erqg#iru#vdlg#vwuhhw#frpsohwlrq/#vdlg#vwuhhw#lpsuryhphqw#dqg#ghglfdwlrq#lv#dw#Sxufkdvhu*v#h{shqvh#dqg#zloo#eh#frpsohwhg#e|#Vhswhpehu#43/#4<;<1

Campbell was also deposed on October 4, 1991. In his deposition Campbell made clear that he entered into an agreement with Clement prior to notifying Provident. When asked if he had discussed with Clement his contract to purchase with Provident, Campbell replied:

D1#Z hc/#qrz /#L#glgq*w00vkh#glg#qrw#vhh#wkh#frqwudfw#ehfdxvh#li#vkh#kdg#vhq#wkh#frqwudfw/#vkh#z rxc#kdyh# nqhz #krz #p xfk#L#z dv#jhwwlqj#iru#wkh#orw#vr#L#glg#qrw#vkrz #khu#wkh#frqwudfw1

T1#Wkdw*v#rnd|1#Wkdw*v#qrw#z kdw#L#dvnhg#|rx1#Exw#|rx#wrc#khu#wkdw#hc#|rx#kdg#z dv#d#sxufkdvh#ri#wkh#orw# dv#lv/#fruhfwB

D1#Z hc/#L#wrc#khu#L#kdg#d#sxufkdvh#ri#wkh#orw1#L#glgq*w#dv#lv#^vlf`1#-#-#-

Elsewhere in his deposition Campbell reiterated that he did not show Clement a copy of the contract to purchase. He testified as follows:

T1#Rnd|1#\rx#dovr#wrc#khu#wkdw#sduw#ri#khu#uhvsrqvlelw|#lq#sxufkdvlqj#wkhvh#orw#z rxc#eh#wr#ilqlvk#wkh# vwuhwh{whqvlrq#vr#lw#frxc#eh#ghglfdwhg#ru#sxedf#xvh/#fruhfwB

D1#L#wrc#khu#derxw#wkh#vwuhwh#Qrz /#dv#idu#dv#ghglfdwlrq#dqg#hc#wkrvh#nlqg#ri#wkljv/#L#grq*w#nqrz #li#L#00

T1#Z kdw#glg#|rx#whc#khu#derxw#wkh#vwuhwB

D1#L#wrc#khu#wkdw#vkh#kdg#wr00wkdw#vkh#kdg#wr#dgg#13#lhhw#wr#wkh#vwuhw#lq#rughu#iru00wkdw#z rxc#jr#dorqj# z lk#wkh#frqwudfw#dqg#wkh#exlghu#wkdw#z dv#rxw#wkhuh/#kh#vdlg#kh#frxc#gr#wkh#z run1

* * *

T1#Rnd|1#Vr#wkh#frqwhqw#ri#|rxu#frqwudfw#z lk#Surylghqw#hjduglqj#wkh#vwuhw/#wkh#xqilqlvkhg#sruwlrq#ri# Fudqilhc#Gulyh/#|rx#wrc#khu#derxwB

D1#L#p hqwlrqhg#sduw#ri#wkh#vwuhw1

T1#Dqg#vkh#nqhz #wkdw#z rxc#eh#sduw#ri#khu#redjdwlrq#dv#idu#dv#ex|lqj#wkh#orwB

D1#Derxw#dggljj#wkh#13#lhhw1

* * *

T1#Dqg#wkdw#z dv#ehiruh#|rx#z hqw#wr#wkh#forvlqj#dw#Surylghqw#Edqn#vkh#nqhz #derxw#wkdwB

D1#Vkh#nqhz #derxw#wkh#vwuhw1

T1#Vkh#nqhz #derxw#wkh#vwuhw#ehiruh#wkh#forvlqjB

D1#\hv/#vlu1

T1#Rnd|1#Dqg#vkh#nqhz#lwz dv#jrlqj#wr#eh#khu#h{shqvh#wr#ilqlvk#wkdw#43#lhhw#ri#vwuhhw/#fruhfwB

D1#\hv/#vlu1

* * *

T1#Gr#|rx#uhfdoo#li#Pv1#Fdmp hqw#uhylhz hg#d#frs|#ri#wkh#frqwudfw#dw#wkh#forvlqjB

D1#L#fdq*weh#ru00L#fdq*wuhdo|#eh#vxuh#wkdw#vkh#glg/#|rx#nqrz 1

T1#Rnd|1

D1#Wrgg#^Od}hoo'#z rxog#nqrz #p ruh#derxw#wkdw#wkdq#L#z rxog1

T1#\rx#grq*wuhfdo#dq|rqh#uhylhz lqj#wkh#frqwudfw#dw#wkh#forvlqjB

D1#L#uhdo|#fdq*wuhfdo/#|rx#nqrz 1#Dv#L#vdlg/#Wrgg#00L#xvw00p dlq|#z kdw#L#glg#dw#wkh#forvlqj#z dv#xvw#vlw# wkuh/#dqg#Wrgg#wrrn#fduh#ri#lo#wkh#exvlqhvv1

* * *

T1#Rnd|1#Glg#|rx#glvfxvv#z lw#Puv1#Fdmp hqw#wkh#rwkhu#whup v#ri#wklv#frqwudfw#|rx#kdg#z lw#wkh#Surylghqw# EdqnB

D1#Vxfk#dv#z kdwB#Vxfk#dv00

D1#Wkh#surudwlrqv#dw#forvlqj/#wkh00wkh#Orw#Qrv1#7:/#7;/#7<#dqg#;4B#Wkhuh#z huh#rwkhu#whup v#ri#wklv# frqwudfw#Glg#|rx#wkduh#lo#wkdw#z lw#Puv1#Fdmp hqw#ehiruh#wkh#forvlqjB

D1#Rqo|#wklqj#L#wkduhg#z lw#z dv#wkh#orw/#|rx#nqrz 1#L#vkrz hg#khu#z khuh#wkh#orw#z huh#dw/#|rx#nqrz /#z kdw# orw#wkdw#wkh#z dv#ex|lqj1

T1#Rnd|1

D1#Wkdw*v#wkh#rqo|#wklqj1

In his affidavit Todd Lazelle stated that he was an employee assigned to the Loan Services Department of Provident and familiar with the sale of the property in question. According to Lazelle, he personally discussed the contents of the contract to purchase between Campbell and Provident with Clement "and she was fully aware of her obligations thereunder." Lazelle stated that he was present during the closing and that Clement read the contract to purchase to her attorney over the phone and discussed with Lazell street improvements and preparation for public dedication.

In his affidavit, Harry G. Allen stated that he was the Loan Services Officer at Provident and that Provident consented to the assignment of the contract from Campbell to Clement on the condition that all terms and obligations of the contract to purchase between Campbell and Provident be assumed by Clement. Allen stated that he would not have approved the assignment had not Clement given assurance that she was subject to the same terms and conditions under the contract to purchase as was Campbell. Attached as an exhibit to Allen's affidavit is a letter he wrote to Clement, dated August 3, 1989, the body of which reads:

> Wklv#dwwhu#lv#wr#qirup #|rx#wkdw#xsrq#sd|p hqw#ri#' 43/333#z h#z lo#frqyh|#wr#|rx#e|#Jhqhudo#Z duudqw|# Ghhg/#Dw#Qrv1#7:/#7;/#7<#dqg#;4#ri#Ehunvklh#Vxeglylvlrq/#Eorfn#E/#Frdudlq#Wrz qvkls/#Kdp lovq#Frxqw|/# Rklr1#Sxuxdqw#wr#Urehuw#Fdp sehoov#dvvljqlqj#klv#Sxufkdvh#Djuhhp hqw#wr#|rx1
>
> Z h/#khuhlq/#dp hqg#wkdw#Sxufkdvh#Djuhhp hqw#wr#shup lw#sd|p hqw#ri#' 43/333#dqg#ghdyhu|#ri#Ghhg#rq#ru# ehiruh#Dxjxvw#48/#4<;<1

At her deposition, Clement testified that it was not true that she had the contract to purchase between Campbell and Provident with her at the closing and reviewed it with Lazelle. She also stated that the only thing she read over the telephone to her attorney was what was on the deed. She stated that she had not seen the contract to purchase between Campbell and Provident, having not received a copy of it from Campbell as he alleged in his affidavit, and that the contract to purchase was not present at the closing. According to Clement, the only thing she signed with respect to Campbell was a letter stating:

> L^/'#Gu#Grulv#Fdp hqw#djuhhv#^vZf'#wr#sd|#wr#Urehuw#D1#Fdp sehoz#wkh#dp rxqw#ri#' 45/333#ksrq#forvlqj#ri# wkh#surshuw|#orfdwhg#dw#Eorfn#E/#Ehunvklh#Vxeglylvlrq/#Frdudlq#Wrz qvkls/#Kdp lovq#Frxqw|#iru#orw#& 7:/# 7;/#7<#) #;41#Wklv#forvlqj#z lo#wdnh#sodfh#rq#ru#ehiruh#Dxjxvw#48/#4<;<1

She stated that Campbell had advised her that the cost of extending the street ten feet would be part of her cost to the builder. She stated that she did not recall Lazelle discussing with her an obligation to finish the street for public dedication. She denied discussing with Lazelle that she bought the lots "as is." Furthermore, she denied that Lazelle told her that she was buying the lots subject to the same terms as Campbell, of which she claimed she was unaware. She denied having any understanding about what the term "public dedication" meant.

II.

Although the plaintiffs-appellants challenge the trial court's grant of summary judgment to Provident on its counterclaim in their second assignment of error, logically this should be considered first. Under their second assignment, the plaintiffs-appellants argue that questions of material fact remained for trial. Specifically, they argue that the trial court ignored the material factual issues raised by the conflicting evidence regarding Clement's knowledge of, and assent to, the terms of the contract to purchase between Campbell and Provident.

Provident's motion for summary judgment was based on the theory of equitable assignment. As Provident acknowledges, such assignments are enforceable in accordance with the intention of the parties. General Excavator Company v. Judkins (1934), 128 Ohio St. 160, 190 N.E.2d 389. The materials submitted by Provident quite clearly manifest the intent of the bank that the sale of the property to Clement be made pursuant to the terms and conditions of the original contract to purchase between Campbell and Provident. The real issue, however, is whether the materials of record affirmatively establish Clement's assent to the assignment.

Clement in her deposition denied that she had ever seen the contract to purchase between Campbell and Provident. She claimed, furthermore, to have never discussed the contract's terms with Lazelle and Allen. The written agreement between Clement and Campbell makes no reference to the contract to purchase or in any way suggests that Clement was agreeing to assume Campbell's obligations under it. In fact, the record is distinctly unclear as to what exactly were the contractual arrangements between Campbell and Clement. Campbell's affidavit and his deposition are contradictory with respect to whether he actually showed Clement the contract to purchase he had with Provident or actively concealed it from her.

The fact that Allen wrote to Clement prior to the closing stating that Provident would convey the lots to Clement pursuant to Campbell assigning his purchase agreement to her indicates that Clement must have known that it was Provident's intent that she assent to an assignment of the contract before closing. For some unknown reason, however, it appears that Provident did not require Clement's written acknowledgement and assent to the assignment before closing. That Clement proceeded to close the deal might, in a different procedural posture, give rise to an inference that she assented to the assignment. However, under Civ.R. 56(C) all inferences are to drawn in the non-moving party's favor. In this regard, the record does not indicate that Clement received this letter and what her response to it was. Clement's assertion that she never saw the contract, if credited, would make it unlikely that she would have assented to its terms. Furthermore, the record is in conflict as to what was actually said and understood between the parties at the closing.

We hold, therefore, that the record does not support summary judgment in Provident's favor because genuine issues of material fact exist on the issue of whether there was an equitable assign-ment. The plaintiffs-appellants' first assignment is, therefore, well taken.

In their first assignment of error the plaintiffs-appellants challenge the trial court's denial of their motion for judgment in reliance upon Civ.R. 54(C).

Civ.R. 54(C) provides in pertinent part:

+F,#Ghp dqg#Iru#Mxgjp hqw1#-#-#-#H{fhsw#dv#wr#d#sduw|#djdlqvw#z krp #d#mxgjp hqw#lv#hqwhuhg#e|#ghidxow/#
hyhu|#ilqdo#mxgjp hqw#vkdoo#judqw#wkh#uholhi#wr#z klfk#wkh#sduw|#lq#z krvh#idyru#lw#lv#uhqghuhg#lv#hqwlwohg>#krz 0
hyhu/#d#ghp dqg#iru#mxgjp hqw#z klfk#vhhnv#d#mxgjp hqw#iru#p rqh|#vkdoo#dp lw#wkh#fodlp dqw#wr#wkh#vxp #
fodlp hg#lq#wkh#ghp dqg#xqohvv#kh#dp hqgv#klv#ghp dqg#qrw#odwhu#wkdq#vhyhq#gd|v#ehiruh#wkh#
frp p hqfhp hqw#ri#wkh#wuldo1

* * *

According to the argument advanced by the plaintiffs- appellants, Provident violated this provision by failing to specify an amount in its demand for damages. In view of our resolution of the plaintiffs-appellants' second assignment of error, however, application of Civ.R. 54(C) has become entirely prospective. Hence, we find the plaintiffs-appellants' first assignment of error not to be well taken.

In their third assignment of error, the plaintiffs- appellants assert that the trial court erred in awarding attorney fees to Provident.[2] For this proposition, counsel for the plaintiffs-appellants merely cites the so-called American rule that holds that, without any specific statutory authorization, attorney fees are not awardable to a prevailing party. This truncated argument completely ignores the trial court's stated basis for awarding attorney fees in the instant action, which was that the action brought by the plaintiffs-appellants was groundless and frivolous, as was their first appeal to this

court.

This court has previously recognized the inherent power of a trial court to sanction a party that has acted in bad faith, vexatiously, wantonly, obdurately, or for oppressive reasons, by imposing attorney fees. *Cincinnati Board of Education v. Arm-str-ong World Industries* (Oct. 25, 1992), Hamilton App. No. C-910803, unreported; *see, also*, *Gahanna v. Eastgate Properties, Inc.* (1988), 36 Ohio St.3d 65, 521 N.E.2d 814, citing with approval *Sorin v. Bd. of Edn. (*1976), 46 Ohio St.2d 177, 347 N.E.2d 181, and *Sladoje v. Slettebak (*1988), 44 Ohio App.3d 206, 542 N.E.2d 701. Although the trial court used the term "frivolous," we interpret this as equatable with "vexatious."

As noted, counsel for the plaintiffs-appellants did not present any argument as to why there was insufficient evidence to support the trial court's finding that his clients acted frivo-lously by either bringing their original claim or appealing the trial court's order granting summary judgment against them on both their claim and the bank's counterclaim. With respect to the propriety of imposing attorney fees incurred as a result of the plaintiffs-appellants' claim, we hold that the plaintiffs-appellan-ts' failure to address these issues on appeal is dispositive.

However, given our resolution of the plaintiffs-appellants' second assignment of error, the imposition of attorney fees resulting from Provident's counterclaim cannot be sustained. Clearly the plaintiffs-appellants' defense and appeal with respect to the counterclaim cannot be deemed frivolous on this record. Hence the trial court's order awarding attorney fees is erroneous to the extent that it includes fees incurred with respect to the counterclaim. On remand the trial court must determine which attorney fees were incurred by the bank defending against the plaintiffs-appellants' claim and which were incurred in pursuing its counterclaim, both at trial and on appeal.

Accordingly, the judgment entered below in favor of Provi-dent and the award of attorney fees are reversed, and this case is remanded for further proceedings in accordance with the terms of this decision.

HILDEBRANDT, P.J., SHANNON and M.B. BETTMAN, JJ.

Notes:

[1]. In his affidavit Campbell did not provide a date or any information regarding the circumstances under which he allegedly provided Clement with a copy of the contract to purchase he had with Provident.

[2]. Although in the first appeal of this case we addressed the merits of the trial court's grant of summary judgment against the plaintiffs-appellants on their claim, we did not address the propriety of the trial court's imposition of attorney fees for Provident's expense in defending against the claim.
